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No. 1059 77

IN THE

SUPREME COURT

OF THE

United States

Spring Term, 1958

MONROVA S. EVARTS,
Appellant, Petitioner,
vs.
WESTERN METAL FINISHING COMPANY,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Monrova S. Evarts, prays that a writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in above entitled case on March 20, 1958 and Re-Hearing denied on April 24, 1958.

OPINIONS BELOW

The Order of the Southern District Court of California Central Division dismissing #15725-WM for lack of Jurisdiction, not adjudication on the merits.

Fed. Rules Civ. Proc. Rule 41 (b), (and the same judgment as prepared in the other case may be submitted). (#16120-WM Court states the case is closed and plaintiff may file another suit, May 27, 1957).

The United States Circuit Court, Affirmed.

JURISDICTION

That the jurisdiction of this court is invoked under 29 U.S.C.A. Sec. 1254; (*Montana Mining v. St. Louis M. & M. Co.,* 204 U.S. 204); XIV Amendment of U. S. Constitution; Title 5 Sec. 1008 p. 464, Sec. 1009(a); 29 U.S.C.A. Secs. 151, 157, 158, Taft-Hartley Act, National Labor Relations Act; 29 U.S.C.A. Sec. 160(c) p. 9, Sec. 8(a)(1)(3), subsec. (1)(3), Sec. 9(f)(g)(h), Sec. 7, Sec. 10(c); Fair Labor Standards Act as amended, Secs. 211(c), 215(a)(1)(5); Labor Management Relations Act, 29 U.S.C.A.

DUE PROCESS FOR JOB-SECURITY

It is of urgent and grave Public importance that a decision for appellant issue from this Honorable court resolving dire conflicts as to the procedures by which Justice under law may be had for job security. Clarification of this important question of federal law, which has not been, and which should be settled by this court, is vital. The present decisions have departed from the accepted Rules for Due Process and Equal Application of the Law. Job-Seniority rights are PROPERTY RIGHTS.

This will promote and improve industrial relations by providing a fair and orderly method for settlement of labor disputes in the event the National Labor Relations Board grossly denies parties their inalienable rights to DUE PROCESS OF LAW.

In this case at Bar, the National Labor Relations Board, in Case #21-CA-1698, abused its discretionary powers, appellant claims, by withholding the Processes for acquiring Justice from her, after proof of law violations were in hands of NLRB deputy.

The appellee arbitrarily and discriminately attempted to fire her for Union activities and wrongfully interfered with her Labor Rights two weeks after a successful NLRB Election certifying Union representation, and after the posted signs limited appellee's authority over employee's pending negotiation of a

Labor Contract in accordance with the Taft-Hartley and N. L. R. Acts.

The denial of appellant's rights to her job without permitting benefit of Grievance procedure hearings, credit for seniority, and work well done represents a threat and challenge to the entire Labor Job-Security Movement.

NLRB deputy-investigator gathered proof of Unfair Labor Practice against appellant who had a job as shipping clerk and was eligible for membership in the Bargaining Unit. Her name had been wrongfully stricken from employees' list by appellee just prior to the signing of the Company-Union Contract. Appellant was a beneficiary of this Contract as it was retroactive in its effect to the date of the NLRB Election at which time appellant's name was on the eligibility list.

The deputy's Amended Complaint in #21-CA-1698 was signed, filed and a tentative date set for trial. Said deputy was then arbitrarily removed from representing her, and appellant was denied a trial.

Appellant contends that this denial of Due Process opened the door for the Federal District Court to hear her cause for denial of Due Process of Law under Act XIV of Amendments of U. S. Constitution, because a record could not otherwise issue for an appeal from the NLRB to the Circuit Court, as there would be nothing for the Circuit Court to review as there was no Finding on evidence taken by the NLRB.

The filing of appellant's cause in the District Court was the only fair and equitable method by which she could hope to prove her case and secure her Constitutional Right, and establish the fact that Industrial Democracy does work well now and that there is a rational agreeable procedure for settling labor disputes. There was no other adequate certain or speedy remedy available for appellant to receive a fair trial on the merits of her complaint and to avoid irreparable injury as she had exhausted her administrative remedies.

The Honorable Justice Frank[illegible]rter in his Book "Men of Law" states—

> "Due Process is not a mechanical instrument. It is not a yardstick. It is a Process."

Action #16120-WM and its continuation (by Order of the court) into #76857-WM Bill in Equity are now one action, (Railway Labor Act, Sec. 3, 45 U.S.C.A. Sec. 153 DC ND):

> "Action by railroad employee against railroad for wrongful interference with seniority rights was action within the federal district court's jurisdiction."

Congress and the United States Courts have accepted the principal that wage earners have the right to Bargain Collectively with the passage of the Railway Labor Act. In 1935, the National Labor Relations Act, 29 U.S.C.A. Sec. 151 et seq. established this same vital

and important principal of Law for workers on a broad Industrial basis.

N.Y. D.C., in *U. S. v. Schultz*, 150 Fed. Supp. 303:

> "The foreclosing of opportunity . . . before a designated authority or existence of prejudice or unfairness are marks which indicate lack of procedural Due Process."

In *NLRB v. Kilborin*, 122 Fed. 2d 609 in headnote 1, says:

> "... Back pay . . . directed against employer who . . . engaged in Unfair Labor Practices under the Act is not by way of penalty . . . but in furtherance of policies of the Act to restore as nearly as possible the status quo which would have existed if discriminating wrong had not been committed." NLR Act Sec. 1, et seq., 29 U.S.C.A. Sec. 151.

THE ISSUE

Whether it was within the power of Congress to clothe the circuit court with exclusive jurisdiction to review deprivation of property rights by the NLRB, in violation of Statutory Procedures as herein stated. When such abuse appears as in the record of this appeal to contain no findings of facts to bring before the circuit court, and such construction of law, or any fact for it to pass upon except errors of law of the district court where a Constitution right of Appellant is involved.

In 25 L.W. 2331 it is said:

> "Thirdly, when the violation of federal policy has occurred and there is no administrative remedy, the federal courts have held that the administrative jurisdiction is not exclusive where irreparable injury will result from failure to grant judicial relief. *Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 22 L.W. 4289. The Supreme Court *rejected* the construction that the Taft-Hartley Act "has occupied the labor relations field so completely that no regulatory agency other than the NLRB and no court may assert jurisdiction over unfair labor practices defined by it, unless expressly authorized by Congress to do so."

See, *Steel v. L. & N. R. R. Co.*, 323 U.S. 192, 167 F. 2d 183.

The courts always have jurisdiction to do justice notwithstanding forms of law and to declare void laws having the effect of violating our Constitution.

It will be remembered that the NLRB appointed an investigator of her claims of Unfair Labor Practices by her employer, appellee. After making a thorough investigation he reported to appellant that she had substantial proof, and he prepared and filed an Amended Complaint in #21-CA-1698, but was then denied permission to represent her in a trial.

That the failure of the district court to accept jurisdiction under the circumstances as stated above, constitutes a denial of Due Process against her rights and deprives her of a full day in court.

DC ND, in *Nix v. Spector Freight System, Inc.*, 157 F. Supp. 10, said:

> "Where union members demanded restoration of their senority rights under a union contract and union and employer held arbitration proceedings at which complaining union members were not represented, such members had exhausted administrative remedies and could institute suit in the federal district court to set aside alleged arbitration and for specific performance of seniority provisions of the union contract."

56 C. J. S. 270 "members of Union or non-members can sue for its breach."

It will also be remembered that the district court in permitting the reading of the Affidavit of appellant in opposition to Motion to restore second amended complaint to the calendar (#16120-WM) which the court

had taken off of its own motion, placed the court in such a position that it was the duty of the district court to place the case back on the calendar and permit the action to be tried. The court was estopped, it is claimed by the appellant by permitting such testimony to be filed that the court had no jurisdiction to deny a trial. Its Minute Order 5/27/57 stating appellant "could file a new suit." And that the court in #76857-WM permitted the reading of Appellant's Affidavit into the record, in Answer to appellee's motion for Further Information and Definite Statement, the court did really take jurisdiction as reported in Reporter's Transcript, in Bill in Equity #76857 to vacate and set aside all discriminatory actions of the NLRB and appellee.

DC NY, *United Grocers Co. v. San Sea Food, Inc.*, 151 F. Supp. 760:

> ". . . complaint would not justify granting of defendants motion to dismiss since whether defendant might ultimately prevail must remain for trial of the issues."

DC Pa. Key F. C. Proc.

> "Rule providing that plaintiff be required to file a more definite statement of claim has as its function the element of want, to prepare a responsible pleading, and rule may not serve as a forerunner for a motion to dismiss."

28 USCA, *Harrington v. Yellot*, 158 F. Supp. 456 p. 459.

The district court was estopped from entertaining a Motion on the part of appellee, where appellee had asked for more definite statement, and was Answered by reading appellant's Affidavit thereto into the record and given to the court, as was the case here. The court so proceeding in this manner estopped the appellee, it is claimed, from making a motion to dismiss as such action had conferred jurisdiction upon the district court.

In *Sweezy v. New Hampshire*, 354 U.S. 235, concerning an appeal was denied but the jurisdiction taken as on Writ of Certiorari.

It was held in *Priest v. Chicago R.I. T. R.R.*, 189 Fed. 2d 815:

> "District court should have taken testimony before ruling on lack of jurisdiction."

Likewise, *Employees v. Westinghouse Corp.*, 348 U.S. 443, Taft Hartley Act Sec. 9(a):

> "Congress in effect told district judges . . . the court has jurisdiction if it arises under the Laws or Constitution of the United States."

Likewise, in *Gulf Oil Corp. v. Fed. Power Comm.*, 128 Fed. Supp. 446 it was held, note 4,

> ". . . where irreparable damages is shown, federal court has jurisdiction to enjoin improper, capricious and arbitrary action of an administrative hearing."

In *NLRB v. Standard Transformer Co.*, 202 Fed. 2d 846, note 3.

> "Generally, an exparte investigation by Regional Director, followed by a ruling without a hearing, fails to afford a party to a labor controversy, the fair trial to which he is entitled.
>
> N.L.R. Act Sec. 9 (c) (4) (d) as amended; 29 U.S.C.A. Sec. 159 (c) (4) (d)."

The extent of Congress to extend and liberalize Fair Labor Standards Act of 1938 Sec. 1 et seq. as amended, 29 U.S.C.A. Sec. 201 et seq.,

> "Might be applied as extending jurisdiction to the Circuit court to review the question of Constitutional jurisdiction of the District court where a right of due process has been denied."
>
> *Mitchell v. Kroger Co.*, 150 Fed. Supp. 31.

CONCLUSION

Farley v. U.S. ex rel, supra, quoted in *Tschiffely v. Tschiffely*, 107 F. 2d 191, the court said:

> "It is not the court which commands petitioners promotion to grade-5, but the Act of Congress which neither the Postmaster General nor this court is at liberty to ignore."

In *Wright v. Walling*, Civ. App. 159 F. Supp. 190, note 1 said:

> "Since the court was called upon to consider matters outside the pleadings, court would treat de-

fendant's motion to dismiss as one for summary judgment." Fed. Rules Civ. Proc., Rule 12(c) 56, 28 USCA.

In *Buhl v. Meninger*, 251 F. 2d 659, said

"On appeal from dismissal of complaint, allegations of complaint must be accepted as true."

Green v. U. S., 356 U.S. 195, Oct. 1957—Official Reports Sup. Ct. Justice J. Black says, p. 199:

"A fair trial in a fair tribunal is a basic requirement of Due Process."

U. S. Sup. Ct. Digest, Bk. 2 p. 176 Sec. 529:

c. "It is the final province of the Supreme Court to determine the existence of Due Process of Law."

Del Castillo v. McConnico, 168 U.S. 674, 18 S. C. 229.

The Public interest will be promoted by prompt settlement in this court, of the questions pertaining to the ability of a person to earn a livelihood, under the protection of the Laws of the Land.

WHEREFORE, in view of the facts aforesaid and applicable law appellant prays that the judgment of the district court and its affirmance by the circuit court be vacated and set aside, and that this Honorable Court grant Summary Judgment in favor of appellant, and that she be restored to her job and seniority rights and all accruing benefits and for full pay for straight time and overtime lost, plus 7% interest from date of

attempted dismissal to date of settlement; and for $10,000.00 exemplary damages, and for costs and reasonable attorney fees for the necessity of bringing these actions, and for such other and further relief as the court deems proper.

Respectfully submitted,

ELON G. GALUSHA
Attorney for Appellant-Petitioner

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONROVA S. EVARTS, *Appellant,*	)	No. 15,725
vs.	)	Mar. 20,
WESTERN METAL FINNISHING CO., a California corporation, *Appellee.*	)	1958

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: Pope, Fee, and Hamley, Circuit Judges.

PER CURIAM:

Monrova S. Evarts instituted this suit on June 24, 1957, by filing a pleading denominated "Bill in Equity". He, former employer, Western Metal Finishing Co., was named defendant. Defendant moved to dismiss the action on the ground that the court lacked jurisdiction of the subject matter. The motion was granted, and a judgment was entered dismissing the action. Plaintiff appeals.

In the complaint, it is alleged that appellee deprived appellant of certain rights because she had voted with the majority of the employees favoring selection of collective bargaining representatives. Specifically, it is alleged that appellee refused to keep appellant's name on the employees' list maintained under the bargaining agreement; terminated appellant's employment without written notice, and without reasonable and probable cause; refused to maintain appellant's wage records, as required by the Fair Labor Standards Act; deprived appellant of her normal fair share of overtime compensation; and conspired with unknown parties "to try to annul her eligibility for membership in the Teamsters' Union, No. 986, L. A."

It is further alleged in the complaint that these actions by appellee were in violation of appellant's rights as a member of the established bargaining unit; violated her seniority and job-classification rights under the National Labor Relations Act and the Taft-Hartley Act; constituted unfair labor practices; and deprived appellant of due process of law.

It is also alleged that appellant sought relief from the National Labor Relations Board. According to the complaint, an NLRB investigator prepared, and appellant signed, a complaint in an NLRB proceeding filed against appellee. (NLRB Case No. 21-CA-1698.) Without appellant's knowledge or consent, however, this investigator was later removed from the case. Without a hearing, the Los Angeles director of NLRB there-

after handed down a decision denying appellant any relief. She appealed to the Washington, D.C., office of NLRB. Without a hearing, that office sustained the director's decision, and denied her request for rehearing. Without appealing from that adverse NLRB decision, appellant instituted this independent proceeding in the district court.

Appellant asks in the complaint that an order be entered declaring her rights and ordering her reinstatement as an employee with full seniority and back pay. She asks that appellee be directed to comply with provisions of the Fair Labor Standards Act and to desist from "further discrimination" under the Taft-Hartley Act, or any other act. Exemplary damages in the amount of $10,000 are also sought. Finally, appellant asked the court to vacate and set aside the order of the same court in case No. 16120-WM, in which appellant's action seeking similar relief was dismissed on April 12, 1954.[1]

The substance of the instant action is that appellant was damaged by certain unfair labor practices indulged in by appellee. Seeking relief, appellant appropriately

[1]Appellee argues that the judgment dismissing the action in response to appellee's motion to dismiss is sustainable on the ground that the judgment in case No. 16120-WM is *res judicata* as to the present controversy. Had the allegations of the complaint adequately revealed this information, and had this been made one of the grounds for the motion to dismiss, this argument would have merit. See *Larter & Sons v. Dinkler Hotels Co.* (5 Cir.), 199 F.2d 854. But neither of these circumstances exists in this case. It is likewise true that a district court, acting *sua sponte*, may dismiss an action where the records of that court show that a previous action covering the same subject matter and parties had been dismissed. *Hicks v. Holland* (6 Cir.), 235 F.2d 183. But here the court did not act *sua sponte*, and did not purport to dismiss the action under the doctrine of *res judicata*.

applied to the National Labor Relations Board. Under the statutory scheme designed by Congress to deal with such matters, this is the only place where such relief may initially be sought.[2]

Appellant was entitled to appeal from the adverse decision of the National Labor Relations Board to this court, or to the Court of Appeals for the District of Columbia. 29 U.S.C.A., §160(f). This is the sole method of reviewing NLRB orders. Appellant did not avail herself of this right of review.

For the reasons indicated, the district court did not have jurisdiction of the subject matter of appellant's "Bill in Equity." That court did not err in dismissing the action.

AFFIRMED.

(Endorsed:) Per Curiam Opinion. Filed Mar. 20, 1958.

Paul P. O'Brien, Clerk.

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[2]*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *California Ass'n v. Building and Construction Trades Council* (9 Cir.), 178 F.2d 175; *United Electrical R. & M. Workers v. General Electric* (D.C. Cir.), 231 F.2d 259; *Anson v. Hiram Walker & Sons* (7 Cir.), 222 F.2d 100.